

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS CONRAD LOGAN,

Defendant-Appellant.

UNPUBLISHED

February 20, 2007

No. 264333

Muskegon Circuit Court

LC No. 05-051323-FH

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to rob (unarmed), MCL 750.88, and assault and battery, MCL 750.81. Defendant was sentenced to 11 to 40 years' imprisonment for the assault with intent to rob conviction and to 90 days in jail for the assault and battery conviction. We affirm.

Defendant first argues that the trial court erred in permitting Shunita Brown to testify at trial, pursuant to MRE 404(b), regarding an earlier, uncharged assault and robbery by defendant. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). To be properly admissible pursuant to MRE 404(b), other acts evidence must be offered for a permissible purpose, the evidence must be relevant to an issue or fact of consequence at trial, and its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Drohan*, 264 Mich App 77, 85; 689 NW2d 750 (2004), *aff'd* 475 Mich 140 (2006).

Here, defendant argues that the evidence was offered for an impermissible purpose and was not more probative than prejudicial. We hold that the evidence was properly admitted to demonstrate both defendant's intent and a common plan, scheme, or system in doing an act. *Id.* at 84. Regarding intent, defense counsel indicated that the defense was, in part, that defendant lacked the intent necessary to commit the offense of assault with intent to rob. It is well established in Michigan that all elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). In addition, defendant's intent was at issue in the case because assault with intent to rob is a specific intent crime. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Accordingly, the evidence was properly admitted to demonstrate defendant's intent.

Additionally, the evidence was also properly admitted to demonstrate that defendant had a common plan, scheme, or system of doing an act. “[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Here, Brown’s testimony evidenced substantial similarities with the charged conduct. Both Brown and Sixto Herrera, the complainant in this case, testified that they believed defendant was intoxicated at the time of the respective incidents. Additionally, both testified that defendant commented on the jewelry they were wearing before assaulting them with a closed fist and attempting to remove their jewelry. These circumstances were sufficiently similar to demonstrate defendant’s common plan, scheme, or system of robbing (or attempting to rob) both Brown and Herrera of jewelry they were wearing. Accordingly, the trial court did not abuse its discretion in determining the evidence was admitted for a proper purpose.

Defendant also contends that the trial court erred in determining that the probative value of the evidence was not substantially outweighed by its unfair prejudice. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Here, the trial court weighed the probative value of the evidence against the potential for undue prejudice and determined the evidence was highly probative for the limited purposes of demonstrating defendant’s intent as well as a common scheme, plan, or system in doing an act. Considering the facts on which the trial court made its decision and the actions it took to mitigate prejudice, i.e., providing a proper limiting instruction, we conclude that the trial court did not abuse its discretion in admitting Brown’s testimony.

Defendant next argues that the prosecutor committed misconduct during closing arguments. Defendant contends that the prosecutor impermissibly shifted the burden of proof during rebuttal argument by stating that Herrera had no motive to lie and was therefore telling the truth. This Court reviews de novo a claim of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). “The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial.” *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Because the propriety of a prosecutor’s remarks depend upon the particular facts of each case, this Court must examine the pertinent portion of the record and evaluate the prosecutor’s remarks in context and in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

During defense counsel’s closing argument, defense counsel insinuated that Herrera was lying and repeatedly attacked Herrera’s credibility. Defense counsel attacked Herrera’s use of the word “uncomfortable” and commented on the lack of corroborating evidence to Herrera’s testimony, including the absence of pictures of Herrera’s injuries or the hat from which defendant allegedly pulled a string. In rebuttal argument, the prosecutor stated that defense counsel presented no evidence that Herrera lied or even a motive for him to lie.

We hold that the prosecutor’s remarks were responsive to defense counsel’s attack on Herrera’s credibility and, when considered in light of these attacks by the defense, were not improper. *Callon, supra*. Because the prosecution may properly argue that a witness is worthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), we conclude

that the prosecutor's argument did not shift the burden of proof to defendant. Furthermore, as noted by defendant, the trial court instructed the jury that the lawyers' statements and arguments were not evidence. Jurors are presumed to follow the trial court's instructions, and there is no indication that defendant was denied the right to a fair and impartial trial. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Finally, defendant argues, in propria persona, that he was denied the right to the effective assistance of counsel because trial counsel did not present an intoxication defense to the specific intent crime of assault with intent to rob. Defendant failed to preserve this issue because he did not move for a new trial or evidentiary hearing below. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000); *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Review of unpreserved claims of ineffective assistance of counsel is limited to error apparent on the record. *Sabin, supra* at 659.

To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice prong of the test, a defendant must "demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original).

MCL 768.37 provides that voluntary intoxication is not a defense to any crime, with a very limited exception not applicable in this case. Contrary to defendant's argument, it does not matter whether defendant was charged with a general intent crime or a specific intent crime; he is not entitled to the defense unless he can demonstrate that the exception applies. Having provided no evidence to demonstrate that the exception applies, defendant was not entitled to the defense of intoxication. Because counsel cannot be found to be ineffective for failing to raise a meritless position, *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), defendant has not demonstrated that counsel was ineffective in this case for failing to present the intoxication defense.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael R. Smolenski
/s/ Christopher M. Murray